ATTORNEY FOR APPELLANT:

HAROLD E. AMSTUTZ
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MICHAEL ANDERSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0706-CR-487
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Les A. Meade, Judge
Cause No. 79D05-0606-FD-00284

December 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Michael Anderson appeals his conviction for Cruelty to a Vertebrate Animal,[1] a class D felony, challenging the sufficiency of the evidence. Specifically, Anderson argues that the conviction must be set aside because the evidence established that he shot the dog, intending to kill it. Thus, Anderson claims that the evidence failed to show that he intended to torture or mutilate the animal within the meaning of the statute. Moreover, Anderson asserts that he shot the dog only because it was about to attack his own dog.

Anderson also claims that the three-year sentence—which consisted of one year executed with two years suspended to probation—was inappropriate and that the trial court improperly identified two aggravating factors. Finding no error, we affirm the judgment of the trial court.

FACTS

On October 5, 2005, at approximately 2:00 p.m., fourteen-year-old John McCormick, Jr., was in his yard in Lafayette when he heard a gunshot. McCormick immediately looked up and saw Anderson, a neighbor, standing on Anderson's porch lowering a rifle. McCormick also observed a dog that belonged to another neighbor run into a nearby wooded area. The dog, a yellow labrador known as "Jo," belonged to Mike Conrad, who lived nearby. Tr. p. 14. When McCormick noticed Jo, she was approximately forty yards from Anderson's property.

[1] Ind. Code § 35-46-3-12(b)(2).

After McCormick went inside and told his parents about the incident, he and a friend, Kaleb Conrad, began to search for the dog. Approximately fifteen minutes later, McCormick found Jo lying on the driveway at Conrad's grandmother's house. McCormick observed that Jo was whining, her nose was torn, and was bleeding profusely. Shortly thereafter, Conrad's grandmother arrived and transported Jo to the veterinarian (vet) for treatment. The vet indicated that the bullet had entered Jo's right nostril and exited from the roof of her mouth. While the vet was able to stop the bleeding by cauterizing the wound, he could not apply sutures because of the nose injury.

Following the incident, a Tippecanoe Deputy Sheriff spoke with Anderson about the shooting. Anderson told the deputy that he shot Jo because she was "vicious" and about "to attack his little dog." Id. at 48-49. Anderson stated that he took a "head shot," intending to kill Jo. Appellant's App. p. 6-7, 63, 140-42. The State charged Anderson with cruelty to a vertebrate animal, and following a jury trial on March 22, 2007, he was found guilty as charged.

Thereafter, Anderson was sentenced to three years with one year executed and two years suspended to probation. At the sentencing hearing, the trial court identified Anderson's poor health as the sole mitigating circumstance. The trial court observed that this offense was Anderson's fifth felony conviction. Anderson's criminal history, his lack of remorse, and his disregard of others were identified as aggravating factors. Anderson now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

In addressing Anderson's challenge to the sufficiency of the evidence, we initially observe that this court neither reweighs the evidence nor judges the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences therefrom that support the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). If there is conflicting evidence, we consider that evidence only in the light most favorable to the judgment. Id. The evidence is sufficient if an inference may reasonably be drawn from it to support the judgment. Id. at 147.

We further note that a conviction may be sustained on appeal where it is based on circumstantial evidence. Pickens v. State, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001). Circumstantial evidence need not exclude every reasonable hypothesis of innocence; rather, circumstantial evidence is sufficient to sustain a conviction where an inference may reasonably be drawn from the evidence to support the judgment. Id. Finally, a conviction may be sustained on the uncorroborated testimony of a single witness or victim. Mathis v. State, 859 N.E.2d 1275, 1281 (Ind. Ct. App. 2007).

Indiana Code section 35-46-3-12 (the Cruelty statute) provides that

> (b) A person who knowingly or intentionally beats a vertebrate animal commits cruelty to an animal, a Class A misdemeanor. However, the offense is a Class D felony if:
>
> (1) the person has a previous, unrelated conviction under this section; or
>
> (2) the person knowingly or intentionally tortures or mutilates a vertebrate animal.

(c) It is a defense to a prosecution under this section that the accused person:

> (1) reasonably believes the conduct was necessary to:
>
> (A) prevent injury to the accused person or another person;
>
> (B) protect the property of the accused person from destruction or substantial damage; or
>
> (C) prevent a seriously injured vertebrate animal from prolonged suffering; or
>
> (2) engaged in a reasonable and recognized act of training, handling, or disciplining the vertebrate animal.

We note that the terms "torture" and "mutilate" have not been defined by our legislature. Thus, it is necessary to consider the plain and ordinary meaning of these terms. Elisea v. State, 777 N.E.2d 46, 48 (Ind. Ct. App. 2002). In Elisea, we observed that

> [t]he dictionary meaning of the word 'torture' is 'to cause intense suffering [or] subject to severe pain.' Webster's Third New International Dictionary Unabridged 2414 (1967). 'Mutilate' means 'to cut off or permanently destroy . . . an essential part of a body' and 'to cut up or alter radically so as to make imperfect.' Id. at 1493.

Id.

In this case, the evidence showed that after being shot in the nose, Jo ran from the scene whining and bleeding profusely. Tr. p. 14, 26, 35-38. This was more than sufficient to establish that Jo suffered severe pain from the gunshot wound. The evidence also established that Jo's nose was torn from the bullet and that she continues to have difficulty breathing because of the wound. Id. at 36, 42. Thus, the evidence showed that Jo's nose was altered radically and rendered imperfect as a result of the shooting. In our

view, the jury could have reasonably concluded that Anderson's actions constituted both torture and mutilation under the Cruelty statute.

Notwithstanding the above, Anderson claims that his act of shooting Jo only once could not have constituted torture or mutilation as a matter of law. Appellant's Br. p. 6. In support of this contention, he directs us to Boushehry v. State, 648 N.E.2d 1174, 1178 (Ind. Ct. App. 1995), where this court reversed one of the defendant's convictions for cruelty to an animal because shooting the animal once and causing the immediate death of that animal did not constitute torture. Although we reversed, we drew a distinction between an animal that had died instantly and another that had only been wounded, concluding that there was sufficient evidence to sustain the cruelty to an animal conviction with respect to the animal that the defendant had only wounded. Id. More specifically, we observed that

> The evidence supports Boushehry's guilt of only one count of cruelty to an animal. Waugh shot two geese. One goose died instantly; there was no evidence presented at trial that either Boushehry or Waugh tortured or mutilated this goose in achieving its death. The act of shooting the goose is not enough alone to establish cruelty to an animal by either torture or mutilation. Because Boushehry was charged with only the torturing or mutilation death of the geese, his conviction for cruelty to an animal based on the death of the goose who died from the gunshot, absent evidence that the goose was tortured or mutilated, cannot stand.
>
> With respect to the wounded goose, the record supports Boushehry's conviction for cruelty to an animal. This goose continued to live after it was shot. The record reflects that the gunshot resulted in injury to the goose's wing. Boushehry then slit the throat of the injured goose. This act constituted mutilation in its plain, or ordinary and usual, sense.

Id. When considering the evidence that was presented in this case, we find that Anderson's reliance on Boushehry is misplaced.

Finally, we reject Anderson's contention that the conviction must be set aside in light of his testimony that he intended to kill Jo because she was vicious and about to attack his smaller dog. Contrary to Anderson's claim, the evidence that the State presented established that Jo was a playful, friendly, and gentle dog. Tr. p. 28-29, 40-41. Moreover, McCormick testified that Jo was nowhere near Anderson's dog when she was shot. Id. at 15, 21-24, 29. In light of the conflicting evidence that was presented, the jury was not required to credit Anderson's version and it could reasonably have determined that Jo was not threatening Anderson or his property when the shooting occurred. In essence, Anderson's arguments amount to an invitation to reweigh the evidence—one that we decline. As a result, we conclude that the evidence was sufficient to support Anderson's conviction.

II. Sentencing

A. Abuse of Discretion

Anderson argues that his sentence must be set aside because the trial court placed too much weight on his criminal history as an aggravating circumstance. Anderson also asserts that the trial court abused its discretion in finding that his alleged lack of remorse and the "ongoing disregard of other people," appellant's app. p. 218, constituted aggravating factors.

It is well settled that sentencing decisions are within the trial court's discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). So long as the sentence imposed is within the statutory range, the trial court's sentencing determination will be reversed only for an abuse of discretion. Id. An abuse of discretion occurs where the trial court's

decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id.

In addressing Anderson's arguments, we initially observe that in Anglemyer, our Supreme Court observed that a trial court "cannot be said to have abused its discretion in failing to 'properly weigh' [mitigating and aggravating] factors." 868 N.E.2d at 493. More specifically, Anglemyer determined that "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Id. Thus, Anderson's argument that the trial court assigned improper weight to his criminal history is not available for appellate review. Id.

With regard to Anderson's claim that the trial court erred in identifying his lack of remorse and his disregard of others as aggravating factors, we note that the letter and statement that Anderson submitted to the trial court at sentencing blamed the entire incident upon Jo, claiming that the dog was a constant nuisance. Appellant's App. p. 214-17; Tr. p. 157-61. As noted above, the jury rejected Anderson's theory that he was merely defending himself and his property from a vicious dog. Moreover, Anderson offered no apology for the shooting. As a result, we cannot say that the trial court erred in determining that Anderson's lack of remorse was an aggravating factor. See Gibson v. State, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006) (recognizing that a showing of remorse, or lack thereof, by a defendant is often better gauged by the trial judge, who views and hears the defendant's demeanor firsthand and determines credibility).

As for Anderson's assertion that the trial court erroneously identified his disregard for others as an aggravating factor, the evidence showed that Anderson shot Jo in a rural

residential area where children and others could have been struck by a bullet. Moreover, Anderson's prior convictions involving criminal recklessness with a deadly weapon and driving while intoxicated demonstrate his endangerment of others. In light of these circumstances, we conclude that the trial court properly identified Anderson's disregard of others as an aggravating factor.

B. Inappropriate Sentence

Anderson further claims that his sentence was inappropriate in light of the nature of the offense and his character. Pursuant to Indiana Appellate Rule 7(B), our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." However, sentence review under Appellate Rule 7(B) is deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court. Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The advisory sentence for a class D felony is one and one-half years imprisonment and the maximum sentence is three years of incarceration. Ind. Code §35-50-2-7(a). The starting point for review of the appropriateness of a sentenceis the advisory sentence. Anglemyer, 868 N.E.2d at 494.

In this case, the evidence established that Anderson shot Jo, a gentle, playful dog that was not on Anderson's property and was not threatening Anderson or his property at

the time of the shooting. While Anderson claimed that he intended to kill Jo, the evidence established that he tortured and/or mutilated her. In our view, the nature of the offense clearly requires no less than the advisory sentence. Thus, we do not find the nature of Anderson's offense to aid his inappropriateness argument.

Turning to Anderson's character, the record shows that he has an extensive criminal history spanning three decades, as well as a juvenile history. Appellant's App. p. 146-48. Anderson's juvenile history includes an adjudication for what would have constituted assault had he been an adult and a probation violation for an adjudication that would have constituted possession of a controlled substance had that offense been committed by an adult. Id. at 146. Anderson's adult criminal history includes felony convictions for illegal drug offenses, criminal recklessness while armed with a deadly weapon, operating a vehicle while intoxicated after having a prior conviction, and operating a vehicle while intoxicated after being a adjudged a habitual traffic offender. Anderson also has misdemeanor convictions for battery, operating a vehicle while intoxicated, and harassment. Id. at 146-48. Anderson's extensive criminal history, alone, is sufficient to sustain the enhanced sentence. Buchanan v. State, 699 N.E.2d 655, 657 (Ind. 1998).

Moreover, the record shows that Anderson appears to be an alcoholic with an extensive history of illegal drug abuse. His substance abuse demonstrates that he has violated the law with impunity for years, which demonstrates his lack of respect for the law. See Iddings. v. State, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002) (recognizing that a history of substance abuse may constitute a valid aggravating factor). Anderson

showed no remorse for this offense, and he continues to violate the law and disregard the welfare and safety of others. As a result, we do not find Anderson's sentence to be inappropriate in light of the nature of the offense and his character.

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.